

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant :	Brandyn Webb, et al.	Art Unit :	2153
Patent No. :	7,502,825	Examiner :	Lashanya Renee Nash
Issue Date :	March 10, 2009	Conf. No. :	7931
Serial No. :	09/788,526		
Filed :	February 21, 2001		
Title :	POPULATING ONLINE FORUMS		

Commissioner for Patents  
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**APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 C.F.R. § 1.705(d)**

Patentee hereby requests reconsideration of the Patent Term Adjustment (PTA) accorded the above-referenced patent. Reconsideration of the final PTA calculation to increase total PTA from 898 to 1,366 days, is respectfully requested.

**REMARKS**

“A Delays” are defined as delays by the U.S. Patent and Trademark Office (PTO) under 35 U.S.C. § 154(b)(1)(A), which guarantees prompt PTO response. “B Delays” are defined as delays by the PTO under 35 U.S.C. § 154(b)(1)(B), which guarantees no more than three year application pendency. To the extent that the periods of delay overlap, the period of any term adjustment shall not exceed the actual number of days the issuance of the patent was delayed. 35 U.S.C. § 154(b)(2)(A). As outlined in Wyeth et al. v. Jon W. Dudas (580 F. Supp. 2d 138; 88 USPQ2d 1538), the only way that these periods of time can “overlap” is if they occur on the same day. If an “A delay” occurs on one calendar day and a “B delay” occurs on another calendar day, they do not overlap and 35 U.S.C. § 154(b)(2)(A) does not limit the extension to one day. Id.

The PTA for the instant patent, as currently calculated and shown on the face of the patent, apparently relies on the premise that the application was delayed under 35 U.S.C. § 154(b)(1)(B) *before* the initial three-year period expired. The Wyeth v. Dudas court determined that this construction cannot be squared with the language of 35 U.S.C. § 154(b)(1)(B), which applies “if the issue of an original patent is delayed due to the failure of the United States Patent and Trademark Office to issue a patent within 3 years.”

**CERTIFICATE OF MAILING BY EFS-WEB FILING**

I hereby certify that this paper was filed with the Patent and Trademark Office using the EFS-WEB system on this date: May 4, 2009.

“B delay” begins only after the PTO has failed to issue a patent within three years, not before.

Id.

### REVIEW OF PATENT TERM ADJUSTMENT CALCULATION

#### “A Delay”

A first PTO action was due on or before April 21, 2002 (the date that is fourteen months after February 21, 2001, the date on which the application was filed). The PTO mailed the first non-final Office Action on July 1, 2004, thereby according a PTO Delay of 802 days. Patentee does not dispute the PTO's calculation for this “A Delay” from April 22, 2002 (the day after the date that is fourteen months after the date on which the application was filed), to July 1, 2004. See 37 C.F.R. §§ 1.702(a)(1) and 1.703(a)(1).

A PTO action was due on or before March 1, 2005 (the date that is four months after November 1, 2004, the date on which a response to Office Action was filed). The PTO mailed a non-final Office Action on May 6, 2005, thereby according a PTO Delay of 66 days. Patentee does not dispute the PTO's calculation for this “A Delay” from March 2, 2005 (the day after the date that is four months after the date on which a response to Office Action was filed), to May 6, 2005. See 37 C.F.R. §§ 1.702(a)(2) and 1.703(a)(2).

A PTO action was due on or before February 4, 2008 (the date that is four months after October 4, 2008, the date on which a response to Office Action was filed). The PTO mailed a non-final Office Action on May 6, 2008, thereby according a PTO Delay of 92 days. Patentee does not dispute the PTO's calculation for this “A Delay” from February 5, 2008 (the day after the date that is four months after the date on which a response to Office Action was filed), to May 6, 2008. See 37 C.F.R. §§ 1.702(a)(2) and 1.703(a)(2).

Patent issuance was due on or before December 6, 2008 (the date that is four months after August 6, 2008, the date on which the issue fee was paid). The PTO issued a patent on March 10, 2009, thereby according a PTO Delay of 94 days. Patentee does not dispute the PTO's calculation for this “A Delay” from December 7, 2008 (the day after the date that is four months after the date on which the issue fee was paid), to March 10, 2009. See 37 C.F.R. §§ 1.702(a)(4) and 1.703(a)(6).

In view of the periods of “A Delay” detailed above, the total “A Delay” for this patent should be calculated as 1,054 days (i.e., the sum of 802 days, 66 days, 92 days, and 94 days).

#### “B Delay”

The period beginning on February 22, 2004 (the day after the date that is three years after the date on which the application was filed), and ending March 10, 2009 (the date the patent was issued), is 1,844 days in length.

“B Delay” may not include the number of days in the period beginning on the date on which a Notice of Appeal was filed and ending on the date of mailing of a Notice of Allowance. In the present application, no Notice of Appeal was filed. See 37 C.F.R. §§ 1.702(b)(4) and 1.703(b)(4).

In addition, “B Delay” may not include the number of days in the period beginning on the date on which a Request for Continued Examination was filed and ending on the date the patent was issued. In the present application, the earliest Request for Continued Examination was filed on February 21, 2006, and the patent issued on March 10, 2009, resulting in a period of 1,113 days that must also be excluded from the three year delay calculation. See 37 C.F.R. §§ 1.702(b)(1) and 1.703(b)(1).

“B Delay” for this patent is therefore calculated as 1,844 days minus 1,113 days, for a total of 731 days. The PTO calculated 0 days of delay for issuance of a patent more than three years after filing. Patentee respectfully submits that the PTO's calculation of this “B Delay” is incorrect and that the correct PTO Delay for issuance beyond three years from filing is 731 days.

#### Overlap of “A Delay” and “B Delay”

As detailed above, “A Delay” accumulated during the following period:

April 22, 2002, to July 1, 2004; and  
March 2, 2005, to May 6, 2005.

As detailed above, “B Delay” accumulated during the following period:

February 22, 2004, to February 21, 2006.

As such, the periods of "A Delay" and "B Delay" overlap (i.e., occur on the same calendar day for a total of 263 days, from February 22, 2004, to July 1, 2004, and from March 2, 2005, to May 6, 2005.

#### Applicant Delay

A reply to an Office Action was due on or before October 1, 2004 (the date that is three months after July 1, 2004, the date on which the Office Action was mailed). Patentee filed a response to the Office Action on November 1, 2004, thereby according an Applicant Delay of 31 days. Patentee does not dispute the PTO's calculation for this Applicant Delay from October 2, 2004 (the day after the date that is three months after the date on which the Office Action was mailed), to November 1, 2004. See 37 C.F.R. § 1.704(b).

A reply to an Office Action was due on or before August 6, 2005 (the date that is three months after May 6, 2005, the date on which the Office Action was mailed). Patentee filed a response to the Office Action on August 8, 2005, thereby according an Applicant Delay of 2 days. Patentee does not dispute the PTO's calculation for this Applicant Delay from August 7, 2005 (the day after the date that is three months after the date on which the Office Action was mailed), to August 8, 2005. See 37 C.F.R. § 1.704(b).

A reply to an Office Action was due on or before February 18, 2006 (the date that is three months after November 18, 2005, the date on which the Office Action was mailed). Patentee filed a response to the Office Action on February 21, 2006, thereby according an Applicant Delay of 3 days. Patentee does not dispute the PTO's calculation for this Applicant Delay from February 19, 2006 (the day after the date that is three months after the date on which the Office Action was mailed), to February 21, 2006. See 37 C.F.R. § 1.704(b).

Patentee filed an Amendment after Notice of Allowance Pursuant to 37 C.F.R. § 1.312 on August 6, 2008. The PTO mailed a Response to Rule 312 Communication, responsive to the August 6, 2008 amendment, on February 5, 2009, thereby according an Applicant Delay of 120 days. Patentee does not dispute the PTO's calculation for this Applicant Delay from August 6, 2008, to February 5, 2009. See 37 C.F.R. § 1.704(c)(10)(ii).

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In view of the periods of Applicant Delay detailed above, the total Applicant Delay for this patent should be calculated as 156 days (i.e., the sum of 31 days, 2 days, 3 days, and 120 days).

#### Terminal Disclaimer

This patent is not subject to a terminal disclaimer.

#### Conclusion

In consideration of the events described above, Patentee believes the PTA calculation of 898 days is incorrect. As such, Patentee respectfully requests reconsideration of the PTA in the following manner:

- 1) Total PTO Delay should be calculated as 1,522 days (i.e., the sum of 1,054 days of "A Delay" and 731 days of "B Delay" minus the 263 days of overlap);
- 2) Total Applicant Delay should be calculated as 156 days; and
- 3) Total PTA should be calculated as 1,366 days.

The fee of \$200 required under 37 C.F.R. § 1.18(e) is being submitted herewith. Please apply any other required charges or credits to Deposit Account No. 06-1050, referencing attorney docket number 07844-0478001.

Respectfully submitted,

Date: May 4, 2009

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